U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.

FRA - LOCOMOTIVE ENGINEER CERTIFICATION CASE
R. C. Beall, Hearing Petitioner, Docket No. FRA 2007-28725
(FRA Docket No. EQAL-06-64)

Herzog Transit Services, Inc., Co-Respondent

CO-RESPONDENT HERZOG TRANSIT SERVICES, INC.'S REPLY TO THE BRIEFS IN OPPOSITION TO ITS MOTION TO DISMISS FOR MOOTNESS

Pursuant to the Administrative Hearing Officer's ("Hearing Officer") Order No. 4, Co-Respondent Herzog Transit Services, Inc. ("Herzog") hereby submits its Reply to the Briefs in Opposition of Hearing Petitioner R.C. Beall ("Hearing Petitioner") and the Federal Railroad Administration ("FRA") ("Petitioner's Opposition" and "FRA's Opposition," respectively).

DISCUSSION

As a threshold matter, Herzog's Motion does not threaten to render the Section 409 process "meaningless." Petitioner's Opposition, at 1. Herzog has repeatedly acknowledged that the Hearing Officer is empowered to determine *de novo* whether revocations are correct. *See, e.g.,* Motion, at 5, 7; Herzog's Response to Hearing Petitioner's Claims (filed January 30, 2009), at 7. However, Herzog's Motion made clear that the Hearing Officer's authority in that regard is narrowly circumscribed and that Hearing Petitioner's relief, if any, is restricted to that narrow determination. Motion, at

5-7. Consequently, Hearing Petitioner's broad requests for relief have no legal basis,[1] and the Hearing Officer's narrow authority means that a decision as to the correctness of Herzog's revocation determination will have no actual effect on the parties under the present facts of the case (and the regulations provide no enforcement authority). Motion, at 7 (*citing Carpenter v. Mineta*, 432 F.3d 1029, 1033 (9th Cir. 2005)). Specifically, under the unique factual circumstances of this case, such a decision has no effect on the parties' present rights because Hearing Petitioner is already employed as a certified locomotive engineer with a third party railroad and a decision – positive or negative – will not affect that situation. Hearing Petitioner simply has no concrete current or imminent injury that can be redressed in this proceeding. Hearing Petitioner and the FRA attempt to gloss over these issues by hypothesizing that the record of the revocation nonetheless might have some future impact on his present or hypothetical future employment, and moreover that Herzog's specific 30-day revocation is somehow "capable of repetition, yet evading review." As discussed below, these arguments are unavailing.

I. Hearing Petitioner Cannot Show a Present and Concrete Injury-In-Fact That Is Redressable In This Proceeding

Hearing Petitioner asserts that the present proceeding is an ongoing case and controversy because it will "directly affect his continuous employment as an engineer." Petitioner's Opposition, at 3; *see generally* FRA's Opposition, at 3. Yet there is no proof of this based on present facts, and there is no showing that Hearing Petitioner continues

[1] In his Opposition, Hearing Petitioner appears to have now backed off of his initial requests for a "revers[al]" of the revocation and the restoration of his alleged "rights and benefits" as originally expressed in Hearing Petitioner's Claims. Petitioner's Opposition, at 3 ("Petitioner wishes to have the revocation of his license reviewed.") However, this narrowed request still does not avoid the mootness issue, since Hearing Petitioner remains unable to show any concrete and redressable current injury related to the 2006 revocation.

to suffer the necessary "concrete injury-in-fact" that could be redressable in this proceeding. *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009) (case and controversy requirement not satisfied when claimant lacks a "sufficiently concrete and redressable interest in the dispute" and claimant must establish an injury in fact) (emphasis added) ("*Fieger*"); *Federal Election Com'n v. Wisconsin Right To Life, Inc.* 551 U.S. 449 (2007) (the case-or-controversy requirement subsists through all stages of the case) (internal citations omitted), Motion, at 9-10. Rather, Hearing Petitioner and the FRA merely speculate regarding the hypothetical effects of the revocation on possible future employment and violations. A brief discussion of the regulatory scheme and relevant case law demonstrates why these theoretical future events do not render the current proceeding a "live" case or controversy.

A. Speculation as to Hearing Petitioner's Hypothetical Future Employment is Not Sufficient to Avoid Mootness

FRA's and Hearing Petitioner's claims might be colorable if he had been fired by Herzog and/or if his employment as a certified locomotive engineer with Veolia or elsewhere was demonstrably harmed by the revocation, such that there was an ongoing and concrete injury-in-fact that might be redressable. However, precisely the opposite happened. There is no dispute that Hearing Petitioner was and remains employed as a certified locomotive engineer, first at Herzog and later at Veolia. Motion, at 8-9. Hearing Petitioner nonetheless posits that should he ever choose to seek similar employment with a third railroad at some unknown point in the future, that employer still "would be free" to reject Hearing Petitioner's application based on the record of the incident. Petitioner's Opposition, at 4. However, there is no indication Hearing

Petitioner actually anticipates any such employment transition,[2] and moreover there is no certainty or even significant probability that such a rejection would then occur.

For example, reviewing railroads are expressly empowered to rely on determinations already made by other railroads concerning an individual's qualifications. 49 C.F.R. § 240.225; *see also* § 240.229(b) & (c) (joint operations). Thus, the far more plausible likelihood is that future employer would review and rely upon Hearing Petitioner's subsequent certification with both Herzog and Veolia as significant favorable factors in its decision, rather than base a rejection solely on the incident in 2006 which predates his current certification. In fact, it appears that just such an example already exists in the record. Hearing Petitioner's hiring by Veolia was subject to Veolia's independent hiring process. Motion, at 2. The fact that Hearing Petitioner was in fact hired despite the earlier revocation is clear evidence that Veolia did not consider the record of the revocation as precluding his hiring (and may also have looked favorably on Herzog's re-certification). If the revocation did not harm Hearing Petitioner's employment with Veolia, it is difficult to imagine it harming future employment with another railroad.

In establishing the necessary injury-in-fact, "[a]bstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) ("*Lyons*"). The party must show that the alleged injury or threat of injury is "real and immediate" rather than "conjectural" or "hypothetical." *Id.* at 102; *see also Fieger*, 553 F.3d at 962 (injury-in-fact must be both

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[2] Both Hearing Petitioner's Opposition and FRA's Opposition are silent as to whether Hearing Petitioner anticipates or has sought such a change in employment generally, let alone with the pending 36-month time period. The "mere power to seek" something that might theoretically affect a party's position "is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by [a] judgment." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (holding that plaintiff's challenge to the constitutionality of Florida statutes' application to an uninsured bank that it has neither applied for nor expressed any intent to apply for amounts to an impermissible request for advice as to "what the law would be upon a hypothetical state of facts") ("*Lewis*").

"concrete and particularized" and "actual or imminent, not conjectural or hypothetical") (emphasis added). Consequently, "past exposure to illegal conduct does not itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects." *Id.* (emphasis added). Again, Hearing Petitioner remains presently employed as a certified locomotive engineer, and demonstrably suffers no present injury or present adverse effects from the 2006 revocation. Hearing Petitioner and FRA do not and cannot point to a current or imminent concrete injury sufficient to sustain this proceeding.[3]

In short, the argument that Hearing Petitioner (1) might seek alternate future employment despite no current plans to do so and (2) that a future railroad might then deny certification solely on that revocation is simply unsupported speculation that does not establish a present or imminent injury-in-fact.[4] *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 13, 15 (1998) (prisoner lacked concrete injury-in-fact for purposes of mootness where concern about present revocation of parole negatively impacting future parole proceedings was merely a possibility rather than a certainty or even probability, and also where it was far from certain that a prosecutor or attorney would make discretionary decision to use revocation) ("*Spencer*"); *see also Lewis*, 494 U.S. at 477 (opinions should not be issued based on a "hypothetical state of facts"); Motion, at 9-10. Hearing Petitioner has no concrete and redressable interest in this proceeding, and it should be dismissed as moot.

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[3] It is also speculative to opine that the 2006 revocation "may affect" Hearing Petitioner's ability to be employed or act as a testifying expert on rail safety. Petitioner's Opposition, at 5 n.3. Hearing Petitioner offers no allegations or proof of any such specific effects and it is unclear whether the incident would arise with regard to or have meaningful impact on Hearing Petitioner's expert qualifications. To the contrary, Hearing Petitioner's statement indicates he already testifies in that capacity, so the 2006 revocation clearly has not precluded such work or disqualified him as an expert. Moreover, such rail safety expertise would presumably be another favorable factor for future employment with a subsequent railroad.

[4] In such an event, Hearing Petitioner would also have a separate opportunity to challenge that decision. *See* 49 C.F.R. § 240.109(f); *see also* § 240.219(a) & (b).

B. Speculation as to Hearing Petitioner's Hypothetical Future Violations is Likewise Insufficient

Hearing Petitioner's and FRA's argument regarding the potential effect of the incident on hypothetical future violations fails for similar reasons. It has been almost 32 months since the incident. Should Hearing Petitioner engage in another violation at this point, due to the length of the intervening time period that incident would be treated as if it were an initial violation for the purposes of a revocation. 49 C.F.R. § 240.117(g)(3)(i) & (ii); *Qualifications for Locomotive Engineers*, Notice of Proposed Rulemaking, 63 Fed. Reg. 50626, 50642 (September 22, 1998) ("if a period of 24 months ... passes between a first and second offense, the second offense period will be treated in the same way as a first offense.") It is only in the hypothetical instance that Hearing Petitioner somehow engages in multiple, separate violations related to separate incidents *in the next few months* that the incident in 2006 *might* have some bearing on future revocation considerations.[5]

Such an attenuated series of hypothetical events does not establish an injury-in-fact and is not an appropriate basis to sustain this proceeding. For example, the Supreme Court will refuse to find a live case or controversy in the situation where plaintiffs theorize about potential future injuries related to possible future arrests, as such a future possibility is not "sufficiently real and immediate to show an existing controversy simply because [plaintiffs] anticipate violating lawful criminal statutes and being tried for their offenses." *Lyons*, 461 U.S. at 103 (emphasis added) (internal citations omitted).

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[5] Multiple violations related to a single incident are treated as a single violation, so multiple separate incidents would be required for multiple violations for the purposes of the progressive revocation scheme. 49 C.F.R. § 240.117(f)(1); § 240.117(g). Moreover, following the first future incident, Hearing Petitioner would then have to serve a one month revocation period and return to full duty before even being able to be at risk for subsequent violations related to separate incidents. 49 C.F.R § 240.117(g)(3)(i). Thus the possibility of Hearing Petitioner even being able to engage in multiple violations before the expiration of the 36 month period, let alone actually engaging in them, is highly unlikely.

Moreover, such future violations would be derived from Hearing Petitioner's own conduct. *See, e.g.,* FRA's Opposition, at 4 ("...if Petitioner caused two more revocable events ..."). The Supreme Court has further clarified in analogous situations that claims of future injuries contingent on the party's own conduct likewise do not satisfy the case or controversy requirement. *See Spencer*, 523 U.S. at 15 (claim that parole revocation could be used to increase prisoner's sentence in future sentencing proceedings failed because it is contingent upon prisoner violating the law, getting caught, and being convicted; the party is assumed to conduct their activities within the law to avoid prosecution and conviction.)

The theoretical possibility that Hearing Petitioner might, through his own conduct, engage in future violations is therefore not sufficient to transform this proceeding into a live case or controversy. This is reinforced by the fact that if Hearing Petitioner takes no elective, affirmative actions with regard to either changing employment or engaging in violations, the 36-month periods for even theoretical consideration of the revocation for either employment or additional revocation purposes will shortly expire without any of the future harms Hearing Petitioner and the FRA speculate about. The fact that the *status quo* involves no present injuries related to the 2006 revocation further demonstrates that this proceeding is moot.[6]

[6] Indeed, Hearing Petitioner indicated in the March 12, 2009 Joint Status Report that discovery in this proceeding might be on the order of 120 days. Joint Status Report, at 2. As discovery has not yet commenced, the 36-month period based on the 2006 revocation may well expire for the purposes of either theoretical future employment issues or subsequent violations before discovery is even completed, let alone a decision rendered in this proceeding. Thus even if the arguments advanced by Hearing Petitioner and the FRA were correct and Hearing Petitioner somehow has an ongoing, present injury due to hypothetical and elective future events theoretically occurring in the waning 36-month period, this proceeding will still be moot prior to a decision being rendered in any event.

II. The "Capable of Repetition, Yet Evading Review" Doctrine Is Not Applicable

Finally, Hearing Petitioner and FRA assert that the proceeding is not moot because of the alleged applicability of an exception to the mootness doctrine for a case that is "capable of repetition, yet evading review." However, the "capable-of-repetition" doctrine applies only in "exceptional circumstances," not just when a particular event happens to be of short duration. *Spencer*, 523 U.S. at 17. It requires two simultaneous circumstances: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again. *Id.* (internal citations omitted).

This exceptional doctrine is inapplicable here because, contrary to FRA's and Hearing Petitioner's implications, not every 30-day revocation would "evade" review if the Motion is granted. Herzog is not arguing that the proceeding was moot as of October of 2006. Rather, it was the subsequent and specific factual developments of this case, including Hearing Petitioner's voluntary departure for work with Veolia in 2007 as a certified locomotive engineer, which rendered the proceeding moot with regard to the review of that revocation – not the running of the 30-day revocation period itself. Motion, at 5.

Under other factual circumstances, a truly live controversy involving such 30-day revocations *would be reviewable* through the enumerated elements of 49 C.F.R. Part 240 Subpart E – as this one was up until it became moot. Just because subsequent factual developments in this specific proceeding have since rendered it moot does not mean all future 30-day revocations would "evade" review. *See, e.g., Spencer*, 523 U.S. at 18

(rejecting application of "evading review" standard in part because prisoner did not show that time between a parole revocation and the expiration of a sentence is always too short as to evade review). For example, given that over 24 months have passed, a future violation by Hearing Petitioner would be treated as an initial violation, and Hearing Petitioner could in fact challenge any related 30-day revocation period on its own merits. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (state's refusal to issue a bank charter is not sort of action likely forever to "evad[e] review" because if bank actually applies for another charter and is denied, that subsequent denial can be reviewed).

Hearing Petitioner also fails to meet the second necessary prong of the test when he theorizes that he "may experience similar discipline in the future." Petitioner's Opposition, at 6; *see also* FRA's Opposition, at 6. A mere physical or theoretical possibility does not satisfy the test, as "if [that] were true, virtually any matter of short duration would be reviewable." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Rather, there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Id.* (rejecting argument that pre-trial bail claim was capable of repetition yet evading review, where there was no "reasonable expectation" or "demonstrated probability" that specific prisoner would be in a position to demand bail before trial again) (emphasis added); *Spencer*, 523 U.S. at 18 (no demonstration of a reasonable likelihood that specific prisoner would once again be paroled and then have that parole revoked).

Again, there is no reasonable expectation or demonstrated probability that Hearing Petitioner himself will be subject to an identical revocation or revocation dispute

involving Herzog (particularly as Hearing Petitioner is presumed to act in accordance with the regulations). Nor is there a reasonable expectation that Hearing Petitioner might experience the same sequence of events at the "IRIS" Interlocking culminating in a revocation. The incident occurred in 2006, and the lack of any similar violations by Hearing Petitioner since then shows there is no reasonable expectation that such will recur.[7]

The theoretical and speculative possibility that Hearing Petitioner himself might be subject to "similar" discipline at some point in the future, under unknown facts and by unknown persons, is not a demonstrated probability sufficient to meet the test. Hearing Petitioner is not challenging the underlying validity or applicability of the relevant regulations, but rather their particular application by Herzog (as affirmed by the LERB) in this case. Hearing Petitioner no longer works for Herzog, and Herzog no longer operates on the line. Thus concerns about whether Hearing Petitioner will be generally subject to those overarching regulations in the future under different facts and involving other parties are irrelevant to whether this specific controversy regarding Herzog's specific application of the regulations will recur. Hearing Petitioner and FRA's cited cases are not to the contrary. *See Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315, 1319 (7th Cir. 1992) (controversy could recur where student that was declared ineligible by sports association could be declared ineligible again by the same association); *Board of Trade of the City of Chicago v. Commodity Futures Trading*

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[7] Although Herzog no longer operates over the line, to Herzog's knowledge there have not been other similar violations involving the IRIS with attendant revocation periods. Nor is there any indication in Hearing Petitioner's pleading that Hearing Petitioner has in fact been subject to similar revocations in the intervening years, and both FRA's and Hearing Petitioner's arguments inherently infer that he has not. Petitioner's Opposition, at 4 ("[s]hould Petitioner be involved in any other incident requiring revocation ..."); FRA's Opposition, at 4 ("...if Petitioner caused two more revocable events before September 2, 2009 ...").

Comm'n, 605 F.2d 1016, 1020-21 (7th Cir. 1979) (where Commission previously issued emergency order to Board of Trade and was charged with regulating Board of Trade, it was reasonable that the same Commission would issue another order to Board of Trade in the future). Here, there is simply no threat that Herzog will again revoke Hearing Petitioner's certification.

In the end, Hearing Petitioner's argument in this regard again distills down to the claim that the revocation still somehow affects his rights with his "current employer and any potential new employer," rather than demonstrating how this precise controversy will recur. Petitioner's Opposition, at 5. Yet as previously discussed neither of those assertions is true. To the contrary, Hearing Petitioner's current employment has been demonstrably unaffected, and there are no present facts showing or even suggesting Hearing Petitioner has a present injury-in-fact related to the 2006 revocation. Consequently, a decision by the Hearing Officer opining as to the correctness of the 2006 revocation will have no effect on the parties, and will be the very sort of advisory and academic decision that courts routinely caution against.

CONCLUSION

Herzog respectfully requests that the Hearing Petitioner grant its Motion for the reasons set forth therein and as further discussed above.

Respectfully submitted,

Brendon P. Fowler

Counsel for Herzog Transit Services, Inc.

Dated: April 24, 2009

CERTIFICATE OF SERVICE
Docket No. FRA 2007-28725
(Formerly FRA No. EQAL 06-64)
Beall-Herzog

The undersigned hereby certifies that the foregoing Co-Respondent Herzog Transit Services, Inc.'s Reply to FRA's and Hearing Petitioner's Briefs in Opposition to Co-Respondent Herzog's Motion to Dismiss has been served on all parties named below in the manner indicated.

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